IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8679 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

NASIRKHAN ALIAS KHANNA SIKANDARKHAN PATHAN

Versus

COMMISSIONER OF POLICE, AHMEDABAD

Appearance:

1. Special Civil Application No. 8679 of 2004

MR ANIL S DAVE for Petitioner

MR HM PRACHCHHAK AGP for Respondent No. 1-3

CORAM : HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 10/01/2005

ORAL JUDGEMENT

1. By way of this Special Civil Application, the petitioner has challenged the order passed by Police

Commissioner, City of Ahmedabad, on 1st of July, 2004 in exercise of powers conferred upon him under Section 3(2) of the Gujarat Prevention of Anti Social Activities Act, 1985 (PASA Act for short) directing detention of present petitioner as bootlegger within the meaning of the PASA Act. The petitioner came to be detained in pursuance of the said order from 1st of July, 2004.

2. The grounds served upon the petitioner as placed on record reveal that in all three crimes came to be registered against the petitioner under Sections 66(1)B, 65-AE 81 and 116 (1)B of the Bombay Prohibition Act. First offence came to be registered on 3rd of January, 2003, second on 24th of January, 2003 and third on 8th of June, 2004. In these three cases, as alleged, bulk of foreign liquor came to be seized from present petitioner. The detaining authority considered the papers of investigation in all the three cases registered against the petitioner and reached to the subjective satisfaction that petitioner was indulged in illegal activities of storing, transporting and selling illegal liquor and was causing damage to public health and thereby the activities of the petitioner was prejudicial to the maintenance of public order. The detaining authority reached to the subjective satisfaction that the petitioner was a bootlegger. The detaining authority also considered that action under Section 93 of the Bombay Prohibition Act as well as under Section 57(c) of the Bombay Police Act was likely to take time and that immediate action was required to prevent the bootlegging activities of the petitioner. The detaining authority also considered that in first two crimes registered against the petitioner, he was released on bail and continued his activity and in the third crime registered against the petitioner, he was in judicial custody, but at any time, he was likely to file the application for bail and was likely to be released on bail and was likely to continue his above said activity and hence the detaining authority passed the above said order which is challenged in this petition.

3. Learned Advocate Mr. Anil S. Dave for the petitioner and learned AGP Mr. H.M. Prachchhak for the respondents were heard at length. Out of various grounds urged, learned Advocate for the petitioner stressed upon the ground that merely registration of crimes against the petitioner under the Bombay Prohibition Act would not amount to disturbing maintenance of public order in absence of other relevant material. It was contended that there was no material at all before the detaining authority to reach to a subjective satisfaction that by

the activities of selling, transporting and storing illegal liquor, public health was affected and thereby the maintenance of public order was disrupted. It was contended that only on this ground, the order challenged in the petition is required to be quashed and set aside. He relied upon a decision of the Division Bench of this Court in Letters Patent Appeal No. 223 of 2000 as decided on 22nd of August, 2000. Learned APP Mr. Prachchhak vehemently objected and opposed the application and the contentions advanced by learned Advocate for the petitioner. It was contended that the petitioner was found bulk of foreign liquor in his possession apparently for selling. Consumption of foreign liquor by public would affect public health so as to disturb the maintenance of public order. It was contended that the detaining authority has reached to the correct subjective satisfaction after relying on the papers of investigation in all the three cases and came to the conclusion that the petitioner was involved in selling illegal liquor and thereby in bootlegging activity. Learned AGP contended that the application be dismissed. Affidavit-in-reply filed by Commissioner of Police for the City of Ahmedabad as placed on record by learned AGP has also been considered.

4. Having considered rival contentions and going through carefully the papers placed on record and including the grounds of detention, it clearly appears that the first two offences came to be registered against the petitioner on 3rd of January, 2003 and 24th of January, 2003. The third offence came to be registered against the petitioner on 8th of June, 2004 nearly after one and half year. The question is, therefore, what was the material before the detaining authority to reach subjective satisfaction that during the period of registration of second offence against the petitioner on 24th of January, 2003 and third offence on 8th of June, 2004 to denote that the petitioner was indulged in activity of storing, transporting and selling illegal liquor. In para - 10 of the affidavit-in-reply it has been made clear by the detaining authority that he has relied upon the papers of investigation to reach to the subjective satisfaction that the petitioner was indulged in illegal activities. Now, it is to be considered whether simply registration of offence against the petitioner that too with the time gap of one and half year would result in subjective satisfaction of detaining authority that the petitioner was indulged in illegal and bootlegging activity.

5. In my humble view, the present facts of the case

are amply covered by the decision of the Division Bench of this Court in Letters Patent Appeal No. 223 of 2000 in the matter of Ashok Balabhai Makwana vs. State of Gujarat as decided on 22nd of August, 2000 wherein in paras 4 and 5 the Division Bench was pleased to observe as under :

"4. In this case of K.S. Zala v. State of Gujarat (supra), the Supreme Court also considered three earlier decisions in the case of Piyush Kantilal Mehta (supra); Omprakash (supra); and Rashidmiya (supra) and observed in para 4 that in none of the three cases relied upon by the learned counsel, the point whether public order can be said to have been disturbed on the ground that the activity of the detenu was harmful to the public health arose for consideration and that the detaining authority has not recorded such satisfaction; moreover in these three cases the detaining authority has referred to some incidents of beating but there was no material to show that as a result thereof even tempo of public order was disturbed, whereas in the case before the Supreme Court in the case of K.S. Zala v. State of Gujarat (supra) the detaining authority has specifically stated in the grounds of detention that selling of liquor by the petitioner and its consumption by the people of that locality was harmful to their health. It was also stated that the statements of the witnesses clearly show that as a result of violence resorted to by the petitioner even tempo of public life was disturbed in those localities for some time. That material on record clearly shows that the members of public of those localities had to run away from there or to go inside their houses and close their doors.

5. If we examine the present case on the anvil of the test which has been applied by the Supreme Court in the case of K.S. Zala v. State of Gujarat (supra), i.e. with regard to the presence of credible material and as to how the detaining authority has made the mention against the appellant being an obstruction to the public health and public order, we find that in the instant case so far as the statements of the witnesses which were recorded with regard to unregistered cases, that ground has been rejected by the learned Single Judge himself. It is, of course, true that after narrating the particulars of the criminal cases, the detaining authority

has mentioned that the activities of the appellant were an obstacle to the public health and public order, but this bald observation cannot be taken to be decisive so as to arrive at the satisfaction that the activities of the petitioner were prejudicial to the public order or public health and that tempo of public life was disturbed. No observation made in any part of the judgment can be read in isolation and bereft the context. The judgment is to be read as a whole and even the observations which have been made by the Supreme Court in para 6 of the judgement are to be considered in light of the earlier observations made in para 5 where presence of credible material before the detaining authority has been insisted upon. Thus, litmus test to find out as to whether it is a case of breach of public order or breach of public health is concerned, credible material has to be there. In the case of K.S. Zala before the Supreme Court, the detaining authority had also relied upon the statements of the witnesses so as to show that violence resorted to by the petitioner in that case had disturbed the even tempo of public life and the material on record had shown that members of the public of those localities had to run away from there and to go inside their houses and to close their doors. No such fact situation has been mentioned in the present case and the ground with regard to the statements of the three witnesses has been rejected by the learned Single Judge himself and it ha been held that there had been violation or infringement of the petitioner's right against such statements. In this view of the matter whatsoever said by the three witnesses with regard to unregistered cases and with regard to the three incidents referred to hereinabove, it cannot be considered to be the material germane for the purpose of consideration of the threat to the public health and public order. Thus, the only material which remains is the registered criminal cases and that by itself cannot be said to be a material for the purpose of holding that the appellant's activities had become a threat to the public order and public health. Necessary material in this regard is totally wanting in the body of the detention order itself. In large number of cases, the Supreme Court has considered that involvement in bootlegging activities even if coupled with violence does not amount to

> threat to public order or public health. The mere mention of allegations unless they are supported by any material cannot be said to be material germane for the purpose of arriving at the satisfaction with regard to breach of public order or public health and we find that after giving particulars of criminal cases, the detaining authority by including certain allegations, not supported by any credible material has simply observed that the appellant's activities were an obstacle to the public health and public order. In this view of the matter keeping in view the observations made by the Supreme Court in the case of K.S. Zala v. State of Gujarat (supra) itself in paras 4 and 5, we do not find that it can be held to be a case of breach of public health and public order. Learned Counsel for the appellant has also argued several other points before us, but we do not find it necessary to go into those grounds. It may be mentioned that it was not a case of breach of public order or public health and it was not argued before the learned Single Judge. Even if that be so, in such matters, the point which arises on the face of the facts of the case by the body of the order itself, which does not require further investigation of the facts, can certainly be allowed to be raised and we allow learned counsel for the appellant to raise this point and find that this point is not without substance. The impugned order passed by the learned single Judge upholding the detention order therefore cannot be said to be in consonance with the settled position of law. The detention order deserves to be quashed and set aside on this ground alone. We, therefore, do not go into other grounds which were raised on behalf of the appellants."

6. Therefore, the investigating papers relied upon by the detaining authority may be denoting breach of law and order. So far as breach of public order or breach of public health is concerned, there must be cogent and germane material to reach to a subjective satisfaction in this respect. Undoubtedly, the only material which remains in this case also for consideration of detaining authority is the material of registration of criminal cases and that by itself cannot be said to be material for the purpose of reaching to the subjective satisfaction that petitioner's activity was a threat to the public order and public health. The order challenged

in this petition therefore is required to be quashed and set aside on this ground alone.

7. In the result, the petition is allowed. The detention order passed against the petitioner under the PASA Act by Commissioner of Police, Ahmedabad City, on 1st of July, 2004, is quashed and set aside. The petitioner - Nasirkhan Alias Khanna Sikandarkhan Pathan is hereby ordered to be set at liberty forthwith if he is not required to be detained for any other purpose. Rule made absolute. DS permitted.

(J.R. VORA, J.)

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